Brigham Young University Journal of Public Law

Volume 5 | Issue 1 Article 5

3-1-1991

Clergy Malpractive: Avoiding Earthly Judgment

Thomas F. Taylor

Clergy Malpractice: Avoiding Earthly Judgment

*Thomas F. Taylor**

I. INTRODUCTION

Professional malpractice is a tort[1] in which a person with superior knowledge or skill above that held by the general community injures someone else by misusing that skill or knowledge. The law requires that professionals, including doctors, lawyers, accountants, engineers, and others, act with the level of skill and learning commonly possessed by the members of their profession in good standing.[2] In recent years, a few American courts have indicated that clergy[3] may be added to this list of professionals.[4] As yet, no published court opinion has formally

---

* Associate, Snow, Christensen & Martineau, Salt Lake City, Utah; B.A. 1982, University of Illinois; M.Div. 1987, Yale University, Divinity School; J.D. 1990, University of Illinois. The author served from 1985 to 1987 as Assistant Minister of Saint Michael's Luthern Church in New Canaan, Connecticut, and acted as a visiting-lecturer for the Department of Religious Studies at the University of Illinois—Urbana from 1988 to 1990. The author thanks Professor Gerard Bradley and Associate Professor Andrew Merritt of the University of Illinois Law School for their creative insights and critical reviews of this article in its preliminary stage. The author also thanks the Brighen Young University Journal of Public Law staff for their assistance in preparing the article.

1. A tort is "[a] private or civil wrong or injury, other than breach of contract for which a court will provide a remedy in the form of an action for damages." BLACK'S LAW DICTIONARY 1335 (5th ed. 1979). Although unnecessary for the legal community, this definition has been included for the convenience of nonlegal readers.

2. *See e.g.*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 32, at 185-93 (5th ed. 1984) [hereinafter PROSSER & KEETON]. The authors point out that persons holding themselves out as professionals are held to a higher standard of care than ordinary persons.

3. The terms "clergy" and "cleric" as used in this article refer to any person ordained, licensed, or otherwise empowered by a church, synagogue, or sect to offer spiritual counseling or guidance. The definition of spiritual counseling is a matter of some controversy and is dealt with later. *See infra* notes 25-32 and accompanying text.

4. The most notable "clergy malpractice" case is Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 490 U.S. 1007 (1989). Since *Nally*, other state courts have wrestled with the validity of the clergy malpractice remedy. The Utah Court of Appeals, citing *Nally*, declined to establish a cause of action for clergy malpractice so as to impose a duty on a Mormon bishop to make further inquiries into family conflicts alleged by a minor, and then, if beyond his expertise, refer the minor to others who are qualified to treat such problems. White v. Blackburn, 787 P.2d 1315, 1318-19 (Utah Ct. App. 1990). The Colorado Supreme Court flatly rejected the remedy of clergy malpractice, finding it unconstitutional. Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988). The Ohio Supreme Court refused to find clergy malpractice where a plaintiff alleged intentional misconduct on the part of a

recognized a cause of action for clergy malpractice. However, some courts have acknowledged that malpractice actions or negligence claims, which would otherwise amount to malpractice, may be applied to the clergy in certain circumstances.[5]

Commentators have written widely on the subject but have reached no consensus.[6] Those who favor the creation of a clergy malpractice tort suggest that church leaders should not receive special immunity from the standards demanded of other professionals.[7] Those opposing clergy malpractice actions commonly argue that it is impossible to create a standard of care for clergy which will not violate constitutional rights, such as the right to free exercise of religion.[8] Also, critics of clergy malpractice actions fear that recognition of this tort would chill communications between the clergy and parishioners who seek counseling.[9]

These arguments over the issue of clergy malpractice have left clergy confused about how to proceed in a variety of circumstances related to their profession. The courts and legislatures have generally failed to offer more sharply defined answers on what might constitute malpractice by the clergy.

This article surveys the present discussions on clergy malpractice.[10] Section II attempts to define the cause of action as nearly as it

---

minister. Strock v. Pressnell, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988). A dissenting opinion in *Strock* noted that malpractice is a viable action against clergy who are negligent in counseling, stating, however, that "clergy malpractice" is a misnomer because the standards for such actions are the same for both secular and religious counselors in the marriage counseling context. *Id.* at 217-21, 527 N.E.2d at 1244-47 (Sweeney, J., dissenting). Finally, one justice of the Alabama Supreme Court indicated that clergy malpractice may be a viable remedy in that state, although that court declined to find such malpractice where plaintiff alleged intentional, not negligent, misconduct. Handley v. Richards, 518 So. 2d 682 (Ala. 1987) (per curiam) (Maddox, J., concurring specially) (1988).

5. *See, e.g.*, Lund v. Caple, 100 Wash. 2d 739, 744, 675 P.2d 226, 231 (1984) (en banc) (court noted that "a malpractice action would be appropriate where a counselor fails to conform to an appropriate standard of care"); *Nally*, 47 Cal. 3d at 100 n.8, 763 P.2d at 961 n.8, 253 Cal. Rptr. at 110 n.8 (court noted its opinion "did not foreclose imposing liability on nontherapist counselors, who hold themselves out as professionals, for injuries related to their counseling activities").

6. *See infra* notes 7-9 and accompanying text.

7. *See* Barker, *Clergy Negligence: Are Juries Ready to Sit in Judgment?*, 22 TRIAL, July 1986, at 56. Barker was plaintiffs' attorney in *Nally*.

8. *See, e.g.*, Comment, *Clergy Malpractice: Should Pennsylvania Recognize a Cause of Action for Improper Counseling by a Clergyman?*, 92 DICKENSON L. REV. 223, 251 (1987).

9. Note, *Intentional Infliction of Emotional Distress by Spiritual Counselors: Can Outrageous Conduct Be "Free Exercise"?*, 84 MICH. L. REV. 1296, 1308 (1986).

10. This article is only a survey of clergy malpractice and is not intended as a tome on the constitutional concerns of imposing liability upon clergy for their counseling activities. *See* Esbeck, *Tort Claims Against Churches and Ecclesiastical Officers: The First Amendment Considerations*, 89 W. VA. L. REV. 2 (1986). Other related issues important to the discussion of clergy malprac-

has been defined by the courts and distinguish it from other tort claims brought against religious organizations and leaders. Section III discusses the advantages and disadvantages of creating clergy malpractice liability actions. Section IV sets forth the most problematic issues on the subject and discusses the likelihood of future acceptance of a clergy malpractice action. Section V suggests some preventative measures for clergy to consider until judicial or legislative powers speak more clearly regarding their legal obligations. Finally, section VI concludes that future malpractice actions against clergy are likely and suggests that the prudent course of action for clergy is to behave as if such an action already exists.

II. Defining Clergy Malpractice

Generally, tort claims against professionals fall into one of two broad categories: intentional or negligence claims. Intentional tort claims require a plaintiff to prove that a defendant intentionally or deliberately committed an act which injured the plaintiff. Negligence claims require a plaintiff to prove the existence and breach of a duty owed to the plaintiff by the defendant. Professional malpractice claims are a specialized type of negligence in which it must be shown that the professional's conduct breached the standards of the profession.[11]

Some courts have noted that to be a separately viable claim, clergy malpractice must fall outside the scope of other recognized torts which can be, and have been, levied against clergy.[12] Courts have recently dismissed claims of clergy malpractice because the plaintiffs did not distinguish that claim from other tort claims.[13] The rationale is that if other intentional or negligence tort claims already exist which suffice to hold clergy liable for their injurious acts or omissions, there is no reason to create a new tort claim of clergy malpractice. Thus, to determine whether clergy malpractice is a definable, viable cause of action, it must

---

tice include *respondeat superior* (liability of a church for injuries caused by that church's clergy) and vicarious liability which might occur while a lay group is using church facilities. While these are interesting and important issues, they are beyond the scope of this article.

11. Prosser & Keeton, *supra* note 2, §32, at 185-93.

12. *See, e.g.*, Strock v. Pressnell, 38 Ohio St. 3d 207, 527 N.E.2d 1235 (1988).

13. *Id. See also* Handley v. Richards, 518 So. 2d 682 (Ala. 1987) (per curiam) (Maddox, J., concurring specially). There is some indication that the courts' unwillingness to recognize clergy malpractice claims is based on a fear that such an allowance would open a flood of suits against clerics, a group of people who could not afford to defend themselves in court. *See* Girdner, *To Err Is Human*, 5 Cal. Law, Aug. 1985, at 21. This flood of suits, however, has not happened in the related counseling fields of psychiatry and psychology. Significantly few suits have been filed against those professionals and have only been filed when such a professional acts outrageously. *See* Comment, *Clergy Malpractice: Making Clergy Accountable to a Lower Power*, 14 Pepperdine L. Rev. 137, 139 n.13 (1986).

be distinguished from other tort claims which a plaintiff may bring against a member of the clergy.

A. Distinguishing Clergy Malpractice from Other Tort Actions—What Clergy Malpractice Is Not

1. Tort claims against religious leaders or groups clearly distinct from clergy malpractice

Carl Esbeck, a professor at the University of Missouri Law School, has written a detailed and thorough article on tort claims against churches and the first amendment implications of those claims.[14] Professor Esbeck discusses a litany of tort claims which have been raised (many of them successfully) against church officials, helping to distinguish clergy malpractice from other torts with which clergy malpractice might otherwise be confused.

Professor Esbeck identifies at least four types of tort claims brought against churches or church officials that fall outside the bounds of clergy malpractice: (1) claims regarding church discipline, (2) tort claims arising outside the course of counseling and discipline, (3) religious fraud claims, and (4) alleged "mind control" claims.[15] These four claims are reviewed below.

a. Claims regarding church discipline. According to Professor Esbeck, there are two kinds of claims arising from church discipline: (1) claims by clergy or church officials, such as deacons, board members, and lay pastors, who have been disciplined or removed from office and who allege they were defamed;[16] and (2) tort claims by church members who have been disciplined by church officials.[17] The second kind of claim often involves defamation, invasion of privacy, and either intentional or negligent infliction of emotional distress.[18] Both types of claims are based on distinct torts, separate from malpractice.

b. Tort claims arising outside the course of counseling and discipline. Tort claims arising outside the course of counseling and discipline involve slanderous and libelous publications. The allegedly defamatory communication is either directed against a church member or official, or against a party wholly unconnected with the church. For example, a church member may sue church leaders if they falsely or maliciously publicly shamed him or her with slanderous statements

---

14. Esbeck, *supra* note 10.
15. *Id.* at 91-113.
16. *Id.* at 91-97.
17. *Id.* at 98-99.
18. *Id.*

before the congregation.[19] A party unrelated to the church may also sue the church or its officials who slander the plaintiff before the general public. In *Church of Scientology v. Blackman*,[20] a psychiatrist filed a suit against a church alleging that the church officials damaged the psychiatrist's reputation by demonstrating outside his office, criticizing his use of electric shock treatments in counseling. This type of claim is also distinguishable from clergy malpractice.

c. Religious fraud claims. A private plaintiff may allege a civil fraud claim against clergy, or a government entity may levy criminal charges against clergy for religious fraud. For example, in *United States v. Ballard*,[21] Guy and Edna Ballard and their son were accused and convicted of mail fraud. The Ballards claimed to have supernatural healing powers for people afflicted with serious diseases and used the United States mails to convey these representations and to solicit and collect funds. However, the Court held that a person can never be tried for holding certain religious tenets, nor can an individual be required to prove in a court of law the objective truth of those same tenets.[22] This type of claim is also distinguishable from clergy malpractice.

d. Alleged "mind control" claims. Finally, as Professor Esbeck explains, "mind control" claims are typically brought by a former member of a religious group.[23] Successful claims of this type usually arise in one of three instances: (1) when there has been force or threat of force, (2) intentional outrageous conduct, or (3) fraud as to purely secular representations.[24] Moreover, these suits are often combined with claims discussed in other categories like fraud, emotional distress, or invasion of privacy. Although the specific elements of clergy malpractice are not easily defined, Professor Esbeck distinguishes these four categories of claims from clergy malpractice. This distinction is helpful because it narrows the focus to better identify a distinctive claim of clergy malpractice.

---

19. *See* Bear v. Reformed Mennonite Church, 462 Pa. 330, 341 A.2d 105 (1975). In *Bear*, the court held that shunning, a type of discipline practiced by some Anabaptists, may be an excessive interference with matters of compelling state interest, such as maintenance of marital and family relationships.

20. 446 So. 2d 190 (Fla. Dist. Ct. App. 1984).

21. 322 U.S. 78 (1944), *rev'd* 329 U.S. 187 (1946). In *Ballard*, the Court established the limits of the permissible regulation and punishment of religious fraud.

22. *Id.* at 88.

23. Esbeck, *supra* note 10, at 110.

24. *Id.*

2. Tort claims arising from the context of pastoral counseling and spiritual guidance

Courts and commentators seem to agree that clergy malpractice claims arise from situations involving pastoral counseling or spiritual guidance.[25] Pastoral counseling situations, however, have also given rise to claims against religious leaders and organizations that are distinguishable from clergy malpractice. For example, clergy have faced suits for seduction and child molestation arising in the counseling setting.[26] These actions are often brought by adults who have sought guidance from clergy or on behalf of children who have been placed in the clergy's care.

When an adult counselee is seduced by, or even willingly consents to sexual relations with a member of the clergy, interested third parties, usually the counselee's spouse, may bring a claim of alienation of affections.[27] This claim, however, has either been abolished or fallen into disuse in most jurisdictions.[28]

In the context of clergy counseling or spiritual guidance, clergy are also arguably liable for breaches of confidential communications. Most jurisdictions in the United States, either by common law or by statute, provide an evidentiary clergy/counselee privilege that protects communications between those parties made in the professional context of spiritual advisement.[29] Perhaps this privilege should be extended to also impose a general duty not to disclose confidential communications received in the context of spiritual advisement. The likelihood that such an argument will succeed, however, is questionable.

The case of *Hester v. Barnett*[30] demonstrates the difficulties that a plaintiff faces in prevailing on this theory. There, the Hesters, a married couple, sued a Baptist minister for "ministerial malpractice,"

---

25. *See, e.g.*, Handley v. Richards, 518 So. 2d 682 (Ala. 1987) (per curiam) (Maddox, J., concurring specially) (the validity of clergy malpractice is most typically articulated in terms of the pastoral counseling function). Apparently, no commentators have suggested an action for clergy malpractice in a context other than clergy counseling.

26. Esbeck, *supra* note 10, at 87 (citing Lund v. Caple, 100 Wash. 2d 739, 675 P.2d 226 (1984) (husband's suit against church and pastor alleging pastor had sexual relations with his wife during counseling); Anderson v. Puhl, No. 159581 (D. Minn. 1983), *reported in* NAT'L. L.J., May 16, 1983, at 3 (suit against Roman Catholic Diocese for tortious injury resulting from priest's homosexual acts with minor)).

27. RESTATEMENT (SECOND) OF TORTS § 683 (1977) reads: "One who purposely alienates one's spouse's affections from the other spouse is subject to liability for the harm thus caused to any of the other spouse's legally protected marital interests."

28. *See* PROSSER & KEETON, *supra* note 2, § 124, at 929-31; *see also, e.g.*, O'Neil v. Schuckardt, 112 Idaho 472, 475-76, 733 P.2d 693, 696-98 (1986) (cause of action for alienation of affections abolished in Idaho).

29. *See, e.g.*, MO. REV. STAT. § 491.060 (1987).

30. 723 S.W.2d 544 (Mo. Ct. App. 1987).

among other claims. The Hesters had gone to the pastor for counseling, who allegedly promised not to divulge anything that the Hesters told him. Despite this, the pastor informed the church community that the Hesters had abused their children.

The court examined the Hesters' claim under Missouri's clergy/counselee privilege which "renders a clergyman incompetent to testify concerning a communication made to him in the professional character as spiritual advisor . . . ."[31] The court rejected the Hesters' claim because the statute's requirement of confidentiality applied only to testimony in judicial proceedings and did not imply any legal duty on confidentiality outside the courtroom.[32]

In sum, a variety of tort claims may be made against clergy for alleged offenses committed in the counseling context. However, clergy malpractice should not be confused with other claims arising from counseling, such as child molestation, alienation of affections, or breach of confidential communications.

B. Clergy Malpractice as a Distinct Tort

How, then, does one define clergy malpractice? What makes malpractice in general different from other torts? Two aspects of clergy malpractice make it different from other tort claims which may be brought against laypersons, and a third aspect, arguably, makes it different from malpractice claims which may be brought against other professionals.

First, as noted earlier,[33] malpractice is a form of negligence and not an intentional tort. Intentional torts, such as fraud, focus on the defendant's state of mind (i.e., whether a defendant intended to do an act which caused harm or damage).[34] The focus of negligence, however, is whether the defendant's conduct was extraordinarily careless (i.e., whether the defendant's actions presented an unreasonable risk upon others to the extent that the defendant should have known to act more carefully in order to avoid injuring the plaintiff).[35] Therefore, a malpractice action is simply a negligence claim alleging that a defendant did not act with sufficient care and should, therefore, pay for injuries resulting from his or her negligence. Claims against a cleric arising from counsel given to a counselee ordinarily do not allege the cleric was intentionally giving bad counsel. Rather, plaintiffs usually allege negli-

---

31. *Id.* at 554 (citing MO. REV. STAT. § 491.060 (1987)).
32. *Hester*, 723 S.W.2d at 554.
33. *See supra* note 11 and accompanying text.
34. *See* PROSSER & KEETON, *supra* note 2, § 38, at 34.
35. *Id.*, § 31, at 169.

gence on the part of the cleric. Clergy malpractice, therefore, is not an intentional tort.

Second, malpractice is a specialized form of negligence defined as the "[f]ailure of one rendering professional services to exercise that degree of skill and learning commonly applied under all the circumstances in the community by the average prudent reputable member of the profession . . . ."[36] Professionals, therefore, when acting as professionals, are held to a higher standard of care than a layperson in a similar situation. For instance, a medical doctor who gives medical advice to a patient must adhere to the standards of the medical profession. A layperson who gives medical advice to another, however, may only be held to a standard of negligence required of other laypersons.

Each specific profession or trade has a unique set of standards that constitute the standard of care in a malpractice action. There are, however, certain common law elements inherent in all malpractice actions. These are:

(1) One must be part of a profession or trade.
(2) The professional must have a duty to those who he or she serves.
(3) The professional must breach that duty by acting or practicing at a level of competence (or standard of care) below that which is normally possessed by members of that profession or trade.[37]

These elements separate malpractice actions from negligence actions against nonprofessionals. If the clergy is viewed as a profession, a cleric might also be held to the standard of care "normally possessed" by other members of the clergy.

Third, clergy malpractice is arguably a unique type of malpractice claim, simply because it applies the elements of malpractice to the profession of the clergy. Actions against medical doctors, lawyers, and accountants for professional malpractice are recognized as medical, legal, and accounting malpractice, respectively. Likewise, other professionals may also be held to the standard of care associated with their profession.[38] The clergy, it may be argued, is similarly a distinct profession, having its own set of "professional standards," for which an action for clergy malpractice should be recognized. As noted earlier, clergy malpractice claims usually arise in the context of pastoral counseling or

---

36. BLACKS LAW DICTIONARY 864 (5th ed. 1979).

37. *See* RESTATEMENT (SECOND) OF TORTS § 299A (1965). The Restatement acknowledges that the level of skill and knowledge the law requires will vary if there are differing "schools of thought" within the particular profession. *Id.* at comment f.

38. *See* PROSSER & KEETON, *supra* note 2, § 32, at 185-86.

spiritual guidance.[39]

Applying these elements to the clergy has proven highly controversial. First, although courts generally recognize clergy as part of a profession, some courts may not consider clergy "professionals" in terms of their legal liability for counseling activities.[40] Moreover, the second and third elements, the existence of a legal duty and the maintenance of a certain standard of care, are even more difficult for courts to apply to the clergy because of the extreme difficulty in fashioning a standard of care which clergy must follow.[41] An examination of positions in favor of and against a recognized claim of clergy malpractice highlight the difficulties of applying the elements of a malpractice claim to the clergy.

III. The Advantages and Disadvantages of Acknowledging a Clergy Malpractice Action

A. Arguments Favoring the Creation of a Cause of Action for Clergy Malpractice Actions

A leading advocate for the creation of a clergy malpractice action is Edward Barker, a Los Angeles attorney who represented the plaintiffs in the leading case of *Nally v. Grace Community Church of the Valley*.[42] The *Nally* case provides rigorous and lucid arguments favoring the creation of a clergy malpractice claim. Because *Nally* is such a rich source for understanding the implications of allowing such a claim, it is helpful to explore the facts of that case.

On April 1, 1979, twenty-four-year-old Kenneth Nally committed suicide by shooting himself in the head with a shotgun. That same year, Kenneth's parents, Walter and Maria Nally, sued Grace Community Church of the Valley in a wrongful death action alleging that

---

39. *See supra* note 25. One may wonder if the clergy could be liable for malpractice for advice given to a congregation in a sermon. The problem with allowing malpractice claims for statements made from the pulpit would be that the requisite fiduciary relationship, which exists in the counseling context, would not be as clear when advice is given over the pulpit. There, the cleric is most likely not aware of the particular problems or emotional state of each member of his or her audience. Moreover, a cleric speaking to an audience cannot know how each member of his or her listening audience will respond to the sermon. Some may take his or her exhortations very seriously, while others may ignore them.

40. *See Nally*, 47 Cal. 3d at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 110 (distinguishing clergy as nontherapist counselors who are subject to different standards of care than professional counselors like psychiatrists and psychologists). Even if pastors could be deemed "professionals," a question exists whether lay pastors should be held to the same standard as full-time pastors.

41. *See* Comment, *supra* note 13, at 148-54.

42. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988), *cert. denied*, 490 U.S. 1007 (1989).

their son's suicide was the result of incompetent counseling by church officials. In particular, the parents alleged that once the pastor and church staff counselors were aware that Kenneth was suicidal, they had a duty to refer him to professional therapists who were competent to handle suicidal counselees. The theory on which the Nallys based their suit was "clergy malpractice."[43]

The California Supreme Court dismissed the suit holding that pastoral, nontherapist counselors had no duty to refer potentially suicidal persons to professional therapists and thus could not be held liable for negligence following a suicide.[44] The court also noted, however, that its opinion did not foreclose imposing liability on nontherapist counselors who hold themselves out as professionals for injuries related to their counseling activities.[45]

In a concurring opinion, Justice Kaufman made reference to the majority's note that nontherapist counselors who hold themselves out as professionals may be liable for injuries resulting from their counseling activities and argued that under that rule, the evidence indicated that Grace Community Church officials did owe a duty of care to the deceased.[46] The evidence upon which Justice Kaufman would have found a duty is that Grace Church officials had represented that they were equipped to deal with suicidal counselees, had developed a close counseling relationship with the decedent, and had realized that suicide was at least a possibility.[47] Justice Kaufman, however, concurred with the result reached by the majority, finding that the defendants had fulfilled that duty in the circumstances.[48]

The *Nally* case has spurred voluminous discussion, often with sharp disagreement, over the propriety of suits for clergy malpractice. Arguing for the creation of a clergy malpractice tort, Edward Barker,

---

43. *Id.* at 287, 763 P.2d at 952, 253 Cal. Rptr. at 102.

44. *Id.* at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 110. Procedurally, the trial court granted summary judgment for defendants on the basis that plaintiffs had failed to raise a triable issue of fact. The court of appeal reversed the grant of summary judgement, focusing on the wrongful death claim based on intentional infliction of emotional distress while ignoring the clergy malpractice claim. The California Supreme Court reversed, de-published the court of appeal's opinion, and remanded the case for trial. At trial, the trial court granted defendants' motion for a nonsuit, and plaintiffs appealed. The court of appeal again reversed, and the supreme court granted certiorari. The supreme court reversed, affirming the trial court's granting of a nonsuit and dismissing the case. *Id.* at 291, 763 P.2d at 955, 253 Cal. Rptr. at 104.

45. *Id.* at 300 n.8, 763 P.2d at 961 n.8, 253 Cal. Rptr. at 110 n.8.

46. *Id.* at 305, 763 P.2d at 964, 253 Cal. Rptr. at 113 (Kaufman, J., concurring).

47. *Id.*

48. *Id.* at 313-14, 763 P.2d at 970, 253 Cal. Rptr. at 119 (Kaufman, J., concurring). Justice Kaufman noted that "defendants were not only aware that Nally was under the care of medical doctors, including a psychiatrist, but affirmatively advised him on several occasions to seek medical care." *Id.*

attorney for the Nallys, places great emphasis on the need to regulate and supervise clergy just like all other professionals.[49] Barker asserts that such a cause of action is needed because, even though clerics are unregulated by their peers as are other professionals, "their close emotional relationships with parishioners give them a unique opportunity to affect lives."[50]

The majority in *Nally* indicated some support for the policy arguments made by Barker in recognizing that clergy should not enjoy absolute immunity in all situations, noting that a nontherapist counselor holding him or herself out as a professional therapist, that is, a licensed counselor, may be held to the same high standard of care as a professional therapist.[51] While the court in *Nally* did not specifically state whether this comment applied to clergy, the court did refer to clergy as "nontherapist counselors."[52]

In support of Barker's argument that clerics should be restrained because many seek and obtain the public's trust and confidence in counseling, statistics demonstrate that people turn to the clergy first in times of emotional stress.[53] One author suggests that this is because turning to the clergy affords unique benefits from the rest of the mental health community and can aid in dispelling fears a counselee or his or her family may have of psychiatry.[54] For example, a cleric often knows the counselee personally. Further, there is no social stigma attached to approaching a cleric with personal problems, as there may be with a mental health professional. Home visitations by the clergy are also common. Finally, most clergy do not charge for their counseling services. Thus, they are in a unique position to successfully entice the public into intimate counseling relationships. In light of this, it is arguably sensible that a member of the clergy should be civilly liable for damages for an injury occurring when (1) a cleric represents him or herself to have certain counseling abilities, (2) a member of the public

---

49. Barker, *supra* note 7, at 56.

50. *Id.* Barker cites the incident at Jonestown, Guyana, to illustrate his point. The Jonestown, incident involved a sectarian California church leader, Jim Jones, who led more than 900 followers to a South American jungle, promising to build a utopian community. Once in South America, the leaders of the church community became increasingly totalitarian in their control and harsh in their discipline of followers. Eventually, church leader Jones organized and ordered a mass genocide of the entire community. Members of the community either voluntarily or forcefully drank Kool-aid mixed with poison. Over 900 died in the incident.

51. 47 Cal. 3d at 300 n.8, 763 P.2d at 961 n.8, 253 Cal. Rptr. at 110 n.8.

52. *Id.* at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 110.

53. *See* Note, *Clergy Malpractice: Bad News for the Good Samaritan or a Blessing in Disguise?* 17 TOLEDO L. REV. 209, 219-21 (1985); *see also* Griffith & Young, *Pastoral Counseling and the Concept of Malpractice*, 15 BULL. AM. ACAD. PSYCHIATRY L. 257 (1987).

54. *See* Note, *supra* note 53, at 221.

enters into a fiduciary counseling relationship relying on that representation, and (3) the cleric deals irresponsibly with that person so as to seriously injure him or her in that counseling context.

The benefits of imposing such liability could arguably be great. Clergy malpractice liability could raise the level of minimum competence of clergy counseling. It could also give the public greater confidence in the ability of clergy to deal with serious emotional or psychological distress. Finally, imposing clergy malpractice liability could clarify to the clergy what their duties to the public are in counseling situations.

Although the court in *Nally* found that clergy liability was neither legally nor factually warranted in that case, the acts or omissions of some clergy in the future may be truly outrageous and may warrant liability. It is hard to imagine that clergy will enjoy absolute tort immunity no matter how egregious their negligent acts are. The creation of a clergy malpractice tort targeted to deter negligent clergy from behaving below acceptable standards of care to the detriment of their parishioner-counselees is, arguably, prudent and sound policy.

B. Arguments Against the Creation of a Cause of Action for Clergy Malpractice

The California Supreme Court's holding in *Nally* illuminates some of the arguments against clergy malpractice actions. Although the court left open the possibility of nontherapist liability in certain instances, the court declined to designate any actionable claim against clergy as "clergy malpractice."[55] The court articulated three reasons, reviewed below, for not imposing a duty upon clergy.

First, the supreme court in *Nally* was unwilling to impose a duty on nontherapist counselors to prevent suicides or to refer suicidal counselees to medical or psychiatric health personnel.[56] In support of this, the court noted that the legislature exempted clergy from licensing requirements.[57] This exemption, the court stated, revealed the legislature's desire that the clergy should be free from state-imposed counseling standards.[58]

Second, the supreme court reasoned that even if a duty were imposed, a standard of care to which clergy should be held would be nearly impossible to fashion because of the large variety of theological

55. *Nally*, 47 Cal. 3d at 299-300, 763 P.2d at 960-61, 253 Cal. Rptr. at 110.
56. *Id.* at 297, 763 P.2d at 959, 253 Cal. Rptr. at 108.
57. *Id.* at 298, 763 P.2d at 959-60, 253 Cal. Rptr. at 109.
58. *Id.*

positions espoused by clergy in the state of California.[59] It may also be noted that the plurality of views in religious counseling is evidenced by the variations of counseling training that clergy receive. While some clergy obtain little or no formal counseling courses in their preparation for ministry, others may base the majority of their ministerial schooling on pastoral or spiritual counseling.

In *Nally*, plaintiffs' attorney Barker tried to overcome the problem of a unified standard of care in clergy counseling by introducing expert testimony from a group of diverse protestant ministers from different denominations.[60] At trial, Barker's experts testified that all competent clergy should be held to at least three common standards of care[61] in counseling situations. Such testimony failed, however, to avoid a grant of nonsuit by the trial court.[62]

Third, the *Nally* court stated that because of "differing theological views espoused by the myriad of religions," imposing a duty of care would "quite possibly [be] unconstitutional," because "[s]uch a duty would necessarily be intertwined with the religious philosophy of the particular denomination . . . ."[63] While the court did not elaborate on the theoretical details of this issue, it has been a major concern of many who oppose clergy malpractice suits.[64] The basic argument is that holding clergy liable for their conduct in the context of spiritual counseling will interfere with their right to exercise religion freely—a right guaranteed by the first amendment.[65] It may be argued that imposing potential liability upon clergy counselors would burden the clergy's free exercise rights in several ways. First, clergy would be forced to defend their religious practices before secular courts. Moreover, the authority of their religion would be undermined because it is called into question by the courts. Finally, the looming threat of a possible lawsuit brought by a counselee might chill the relationship between the cleric and his or her counselees.

In addition to constitutional difficulties, practically it may be too difficult for a court to determine the point at which a counselor/coun-

---

59. *Id.* at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109.

60. Barker, *supra* note 7, at 58. *See also Nally*, 47 Cal. 3d at 289 n.4, 763 P.2d at 953 n.4, 253 Cal. Rptr. at 103 n.4 (noting that the trial court refused to hear testimony of a witness from the American Pastoral Counseling Association who was to attest to a standard of care applicable to all clergy).

61. *See infra* text accompanying note 93 (three common standards set forth).

62. *See supra* note 44.

63. 47 Cal. 3d at 299, 763 P.2d at 960, 253 Cal. Rptr. at 109.

64. *See* Esbeck, *supra* note 10, at 2-114; Comment, *supra* note 8, at 232-39.

65. U.S. CONST. amend. I. The establishment and free exercise clauses together read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." *Id.*

selee relationship arises.[66] It is unfair to hold clergy liable for counseling-related activities when it is not clear to both parties whether a counseling relationship even exists.[67] Spiritual counseling occurs in a variety of settings ranging from informal conversations over the telephone or in classrooms to formal sessions in the confessional or the privacy of a clergy's office. Professor Esbeck notes that clergy typically have no pecuniary interest in the counseling relationship; thus they are distinct from other professionals.[68]

Finally, the disdain which many religions have for psychiatry and psychology may make it impracticable to impose malpractice liability upon clergy.[69] Some clergy may believe that secular psychology is not an appropriate solution for a spiritual problem. This argument again raises the problem of how to craft a unified standard of care between a cleric who ignores modern psychology in his or her counseling practices and one who holds that spiritual healing is best facilitated through, and is incidental to, psychological therapy.[70] Further, this problem also may require courts to scrutinize protected areas of the clergy's religious belief.[71]

The arguments disfavoring the allowance of clergy malpractice suits are compelling and so far have prevailed in the courts. However, the *Nally* case suggests that, given the right circumstances, a cause of action for clergy malpractice may be just around the corner. The likelihood of a successful clergy malpractice claim in the future, and how a court upholding such a claim might address the arguments articulated above, is the subject of the next section.

---

66. *See* Esbeck, *supra* note 10, at 83.

67. *See* Comment, *supra* note 13, at 157-58. This commentator suggests that a two-fold test, with an objective and a subjective prong, will reveal if a counseling relationship exists. Under the objective prong, courts can determine whether a member of the clergy is engaged in counseling if observable activities are consistent with a secular counterpart. Under the subjective prong, the court would determine if each party perceived that a counseling relationship existed. *Id.*

68. *See* Esbeck, *supra* note 10, at 83.

69. *See id.* at 84.

70. *See* Griffith & Young, *supra* note 53, at 257-65. Griffith and Young argue that the difficulty in defining pastoral counseling will be a major stumbling block in developing a standard of care for clergy malpractice claims. It may also be argued that the extent to which pastoral counseling is religious versus psychological is indeterminable.

71. *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (establishing that the Constitution's religion clauses allow absolute protection of freedom to believe, but limited protection of freedom to act, the latter being subject to protection of society). One might argue, based on *Cantwell*, that clergy counselors may not act outrageously so as to injure a counselee, even if their acts are religiously motivated. A problem in clergy negligence cases, however, is that a cleric's failure to act may also cause injury. A more difficult question is whether a nontherapist counselor who fails to do something because of religious reasons is protected by the free exercise clause.

IV. The Likelihood of Successful Clergy Malpractice Claims

A tally of the arguments in the preceding section on the pros and cons of creating a clergy malpractice tort shows that a greater number of arguments disfavor the tort. However, that does not necessarily mean that the possibility of a successful clergy malpractice claim is foreclosed.

First, courts have demonstrated that they are not afraid to hold clergy or their churches liable for torts if a legal wrong has been committed.[72] The first amendment does not create blanket immunity for everything clergy do, irrespective of the injury or negligence involved. As noted earlier, the Supreme Court held in *United States v. Ballard*[73] that the courts may not challenge the accuracy of one's sincere religious beliefs.[74] However, it is certainly conceivable that clergy could act negligently in a counseling situation, "at least where their religious beliefs are not challenged," precisely the argument posited in *Nally*.[75]

Second, some courts have shown a greater willingness to hold nontherapist counselors in general to a higher standard of care than the public at large. For example, the California Court of Appeal in *Richard H. v. Larry D.*[76] ruled that a marriage counselor may be liable for "negligent infliction of emotional distress" for having sexual relations with a patient's spouse while the couple was receiving marital counseling.[77] The court rejected defendant's argument that the complaint was barred by a California statute which states that "no cause of action arises for . . . [s]eduction of a person over the age of legal consent."[78] The court concluded that it was reasonably foreseeable that a person seeking a counselor's help in order to stabilize and improve a marriage would feel betrayed and suffer emotional distress upon learning that the counselor, during the treatment, had been engaging in sexual relations with his or her spouse.[79]

While *Richard H.* appears similar to claims against clergy for alienation of spousal affections, mentioned earlier, there are two impor-

---

72. *See* Note, *supra* note 9, at 1303 n.21 (citing Bass v. Aetna Ins. Co., 370 So. 2d 511, 514 (La. 1979) (church liable for pastor's negligence when pastor created unreasonable risk of injury by not clearing aisles of praying parishioners to make way for the "running or moving 'in the Spirit' [which] were common forms of religious expression at that church"); Schoen v. Kerner, 544 S.W.2d 43 (Mo. Ct. App. 1976) (charitable immunity defense unavailable to individual priests who failed to warn or to abate dangerous condition in rectory)).

73. 322 U.S. 78 (1944).

74. *See supra* notes 21-22 and accompanying text.

75. *See* Barker, *supra* note 7, at 59.

76. 198 Cal. App. 3d 591, 243 Cal. Rptr. 807 (1988).

77. *Id.* at 596-97, 243 Cal. Rptr. at 810.

78. *Id.* at 594, 243 Cal. Rptr. at 808 (quoting Cal. Civ. Code § 43.5 (West 1982)).

79. *Id.* at 596, 243 Cal. Rptr. at 810.

tant differences. First, alienation of spousal affections is an intentional tort. The claim in *Richard H.* was for alleged *negligence* on the counselor's part. Negligence standards, which are the basis of malpractice claims, do not merely prohibit improper behavior but demand proper behavior. Professional standards hold a professional to an *affirmative duty* to conform to a certain level of professionalism. Although the tort of alienation of affections had been abolished in California, the *Richard H.* case illustrates that similar conduct, when committed by a professionals engaged in their profession, gives rise to a separate claim for professional malpractice. The abolishing statute, which ordinarily provides a defense for those who seduce another over the age of legal consent, does not extend to counselors in a marriage counseling context.

Second, as noted above, alienation of spousal affections is recognized only in a dying minority of jurisdictions.[80] The court in *Nally* designated clergy as nontherapist counselors.[81] Thus, presumably, clergy in California may be held to the same higher standard of care toward marriage counselees as the marriage counselor in *Richard H.*

A third factor, indicating that some plaintiffs may eventually succeed in clergy malpractice actions, is illustrated by the California Court of Appeal's holding in its second consideration of the *Nally* case. As characterized by the supreme court, the court of appeal held the following in a two-to-one decision:

> The Court of Appeals again reversed, holding that although the "clergyman malpractice" count failed to state a cause of action separate from the "negligence" count, both could be construed as stating a cause of action for the "negligent failure to prevent suicide" by "nontherapist counselors." In this context, the Court of Appeals held that nontherapist counselors—*both religious and secular*—have a duty to refer suicidal persons to psychiatrists or psychologists qualified to prevent suicides.[82]

The supreme court also noted that the court of appeal held that the imposition of a negligence standard of care on pastoral counselors does not violate the free exercise of religion guaranteed by the first amendment.[83] The court of appeal reasoned that there is a compelling state interest in the preservation of life that justifies the "narrowly tailored burden on religious expression imposed by such tort liability."[84]

---

80. *See supra* note 28 and accompanying text.

81. *See supra* note 52 and accompanying text.

82. Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 290, 763 P.2d 948, 954, 253 Cal. Rptr. 97, 103 (1988) (emphasis in original).

83. *Id.* at 290, 763 P.2d at 954, 253 Cal. Rptr. at 104.

84. *Id.*

The court of appeal's decision reveals the willingness of some judges to hold the clergy to the standard of other nontherapist counselors. While the court of appeal did not label the alleged tort "clergy malpractice," its decision recognized a tort in the context of clergy counseling. Had the court of appeal's decision stood, it would have been a case where a member of the clergy was liable for negligent acts done or omitted in the course of that profession. Arguably, this amounts to "clergy malpractice."

Finally, as alluded to earlier, the California Supreme Court explicitly left open the possibility of liability for nontherapist counselors who hold themselves out as professionals and who negligently cause injuries in the course of their counseling activities.[85] In future cases, then, liability may hinge on whether a nontherapist cleric held him or herself out as competent to counsel certain kinds of emotional problems.

Practically, a judge or jury would have difficulty distinguishing a nontherapist cleric who held him or herself out as a professional (i.e., a licensed counselor) from any other professional counselor. As noted above, in his concurrence in *Nally*, Justice Kaufman recognized a duty on the part of defendant pastors to refer Kenneth Nally to competent medical and psychiatric authorities.[86] Future judges may use a similar analysis to determine that a cleric represented him or herself as a professional counselor. Thus, Justice Kaufman's view of how Grace Church leaders held themselves out as competent to deal with suicidal counselees merits an extensive quotation. Justice Kaufman noted that the record in *Nally* revealed:

> The Grace Community Church (Church), at the time of the events in question, employed about 50 pastoral counselors . . . . Pastoral counseling, as described in the church's 1979 annual report, constituted "a very important part of the ministry at Grace Church." Church counselors offered their services not only to congregants, but to large numbers of nonmembers as well. In 1979, the annual report noted, about 50 percent of those seeking counseling came from outside the church. Furthermore, while much of the counseling was an ad hoc or "drop-in" nature, more formal counseling was offered as well, with regularly scheduled counseling "sessions" much like those between a therapist and a patient . . . . [A] number of church pastors taught classes, published books and sold tape recordings on the subject of biblical counseling.
>
> . . . Several of the counselors testified that they considered themselves fully competent to treat a whole range of mental illnesses, in-

85. *See supra* note 51 and accompanying text.

86. *See supra* notes 46-48 and accompanying text.

> cluding depression and schizophrenia . . ., [and] claimed to possess not only competence, but broad experience in the counseling of persons with recurrent suicidal or even homicidal tendencies.
>
> . . . [A] church publication entitled, "Guide for Biblical Counselors" (Guide) [asserted that] . . . absent a gross psychological cause such as a brain tumor, "every emotional problem" was within the competence of the pastoral counselor to handle. Among the symptoms or disorders the Guide listed as falling within the pastoral counselor's domain were "drug abuse, alcoholism, phobias, deep depression, suicide, mania, nervous breakdowns, manic-depressive [disorder] and schizophrenia."[87]

This passage illuminates how some courts might interpret the majority's phrase, "nontherapist counselors who hold themselves out as professionals," as one holding him or herself out as competent to handle suicidal counselees.[88] If Justice Kaufman could find a duty in *Nally*, it is conceivable that other reasonable courts and juries could also find that clergy who engage in the above quoted activities would be holding themselves out as competent to deal with suicidal counselees. A cleric holding him or herself out in such a manner who does not act as responsibly as the defendants in *Nally* and who injures a counselee, might be found liable for clergy malpractice damages. Although it may be incidental that a nontherapist counselor is also a member of the clergy, that cleric would nonetheless be liable for negligent acts done in the context of his or her profession.

V. Preventative Measures

The protest by clergy, church officials, and related organizations against allowing clergy malpractice claims has been overwhelming. In *Nally*, amicus briefs from churches, synagogues, and religious groups around the nation were filed in support of defendants.[89] One amicus petition included 6,669 churches and related organizations.[90] In addition to acting as attorney for defendants in *Nally*, former United States Solicitor General and present President of Brigham Young University, Rex Lee, filed an amicus brief on behalf of the Church of Jesus Christ of Latter-Day Saints, arguing that if upheld, clergy malpractice claims would "discourage many of the church's bishops and other ecclesiastical leaders from counseling emotionally troubled members about their spir-

---

87. *Nally*, 47 Cal. 3d at 305-06, 763 P.2d at 964-65, 253 Cal. Rptr. at 114-15 (citations omitted) (Kaufman, J., concurring).

88. *Id.* at 300 n.8, 763 P.2d at 961 n.8, 253 Cal. Rptr. at 110 n.8.

89. Blodget, ***Religion Liable for Counseling?*** 74 A.B.A. J., Aug. 1, 1986, at 30.

90. *Id.*

itual and other problems."[91]

Despite protest by religious leaders, however, clergy malpractice claims will probably not simply disappear. Thus, at present, prevention appears to be the best remedy. In order for clergy to determine what measures would best immunize them from liability, they should consider the concepts discussed earlier, which comprise a cause of action for malpractice of any kind: (1) the existence of a professional relationship which imposes a fiduciary duty of care upon the professional towards the client (parishioner-counselee), (2) identifiable standards to which the professional should be held, and (3) injury resulting from breach of the duty of care.[92] Also, clergy should consider how existing cases—particularly *Nally*—dealt with those tort concepts.

As for the duty element, clergy would best protect themselves from liability by presuming the existence of a professional and legal duty to counselees. While case law and commentators may continue to argue that no such duty should exist, a presumption that a duty does exist will keep the clergy alerted to maintain high professional standards in all counseling situations.

The second element of malpractice noted above indicates that clergy should define what constitutes "responsible" conduct in their counseling activities and abide by that level of responsibility. Consciously determining what behavior is most appropriate as a cleric will improve the quality of one's counseling and will simultaneously help reduce the risk of legal liability. Where should clergy turn to determine what might be considered "responsible" conduct for a counselor? As noted earlier, in *Nally*, before the trial judge dismissed the case, plaintiffs' attorney offered expert testimony which he argued established identifiable standards of care for clergy in the counseling context.[93] Three ministers, who also practiced psychiatry or psychology and were from both liberal and conservative denominations, testified that the following standards were interdenominationally used among responsible clergy. Those standards are:

(1) Investigation—the cleric investigates whether the counselee is serious about suicide (or another conduct for which the clergy may be held liable).

(2) Referral—if no psychologist or psychiatrist is connected with the counseling and if warranted based on the investigation, an appropriate referral should be made.

---

91. *Id.* (quoting Amicus Brief for Respondents, Nally v. Grace Community Church of the Valley, 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988)).

92. *See supra* text accompanying note 37.

93. *See supra* notes 60-61 and accompanying text.

(3) Consultation—vital information should be shared with professionals and nonprofessionals who are in a position to help.[94]

Despite the ultimate dismissal of the Nallys' claim, the expert testimony they offered is instructive for clergy because it suggests some tangible and sensible directives which clergy can apply to their counseling ministries and which may help to insulate them from legal liability. Thus, it seems likely that, at least in California, courts would not find clergy liable if they follow the recommendations of plaintiffs' experts in *Nally*. Clergy who frequently counsel parishioners should develop a network of responsible professionals in related counseling fields with whom they can consult and to whom they can refer counselees. That network may include psychiatrists, psychologists, marital and family counselors, and fellow clergy.

Clergy should also consider that the California Supreme Court in *Nally* suggested that clergy who "hold themselves out as professionals" may be held to the same high standards of care to which professional counselors (i.e., licensed therapists) are held.[95] Thus, in order to avoid legal liability, a cleric should begin a counseling relationship by clearly defining what he or she is equipped to handle as a counselor. The cleric should state his or her limits and inform the counselee that if the counselee's problem is beyond his or her abilities as a cleric, then he or she may refer the counselee to a colleague who knows more about the counselee's problem. One commentator suggests that this boundary-setting may even take the form of a disclaimer posted outside a church counseling office.[96]

It may be argued that a cleric's referral of a counselee to other professionals will cause the counselee to lose confidence in the cleric. However, that criticism seems misguided. A sick patient who approaches his or her medical doctor does not lose confidence in the doctor when he or she refers the patient to a specialist who is better equipped to deal with the patient's specific medical problem. Similarly, if a parishioner trustingly approaches clergy for counseling, the parishioner will not likely lose confidence in the cleric who suggests that the counselee may be directed to a counselor more skilled to handle the parishioner's problem. Indeed, a parishioner-counselee may even have greater confidence in a cleric who investigates, refers, and consults be-

---

94. *See* Barker, *supra* note 7, at 58. Because the California Supreme Court found no duty existed, the issue of whether plaintiffs' established a valid standard of care for clergy was not addressed.

95. *See Nally*, 47 Cal. 3d at 300 n.8, 763 P.2d at 961 n.8, 253 Cal. Rptr. at 110 n.8.

96. *See* Comment, *supra* note 13, at 137.

cause the counselee realizes that the cleric is in contact with a larger network of mental and physical health workers in the community, all of whom are there to help the counselee.

Some clergy may have the training and experience to handle serious emotional problems of members of the community and they may choose to represent themselves in that manner. Those clergy should be prepared to confront the potential liability of their professional counterparts such as psychiatrists or psychologists.

Those interested in limiting the tort liability of clergy might also consider writing to state legislators to encourage them to draft legislation immunizing clergy from malpractice liability. The *Nally* case may be relied upon in arguing that, for legal purposes, clergy should be considered nontherapist counselors (i.e., non-licensed) who should not be legally bound by state-imposed duties to refer counselees to medical or psychiatric doctors. Finally, if clergy want to reduce the risk of being held personally liable for their counseling actions, they should purchase "clergy malpractice insurance." Courts and commentators have indicated that this insurance is available.[97]

VI. Conclusion

Since ancient times religious communities have prescribed limits on the behavior of their religious leaders. In ancient Israel, for example, the religious community executed false prophets whose prophecies did not come true.[98] Levitical priests were to receive no inheritance from other Israelites,[99] although they were entitled to support by receiving portions of each sacrifice given by worshippers.[100] In ancient Christianity, one of the Pauline letters, *I Timothy*, delineates the requirements of a bishop, stating:

> If anyone aspires to the office of bishop . . . [he] must be above reproach, the husband of one wife, temperate, sensible, dignified, hospitable, an apt teacher, no drunkard, not violent but gentle, not quarrelsome, and no lover of money. He must manage his own household well, keeping his children submissive . . . [,] [and] he must be well thought of by outsiders.[101]

---

97. *See Nally*, 47 Cal. 3d at 299, 763 P.2d at 960, 253 Cal. Rptr. at 110 (citing Note, *Intentional Infliction of Emotional Distress: Can Outrageous Conduct Be "Free Enterprise"?*, 84 Mich. L. Rev. at 1296, 1300 n.12 (1986)).

98. *Deuteronomy* 13:1-5.

99. *Deuteronomy* 18:1-6.

100. *Leviticus* 2:2-3.

101. *I Timothy* 3:1-7 (Rev. Stand.). The *I Timothy* text also discusses the qualifications for other church leaders such as deacons (*I Timothy* 3:8-13) and elders (*I Timothy* 5:17-22).

Contemporary clergy malpractice actions also attempt to regulate clergy behavior or at least to limit the extent to which clergy may act freely when they counsel parishioners. The difference between modern clergy malpractice actions and the Jewish and Christian regulations mentioned is the source of regulation. Directives for clergy behavior from within a religious community is, to Americans, probably more palatable than directives for religious leaders prescribed by a state judiciary or legislature. Unpalatable as state directives may be, the behavior of prominent, trusted ministers in the 1980s has demonstrated that some acts by clergy may be so shocking that society *will* articulate legal limitations for the clergy in certain circumstances.

Odds are that future careless acts by some clergy somewhere will force the courts and society to determine what the limits and duties of the clergy are in the clergy counseling context. For example, will we consider it permissible for clergy to discourage parishioner-counselees from taking medication which stabilizes their mental and emotional states, if the sole basis for the clergy's advice is an unwarranted self-confidence in his or her ability to counsel? What if the counselee stops taking the medication and kills him or herself? What if the clergy knew of the likelihood that the counselee would commit suicide without the medication? What if the clergy did not consult anyone else about the counselee's problem? Should it matter if the cleric represents him or herself to the public by referring to him or herself as "doctor?" What if the cleric advertises his or her counseling abilities in the newspaper or through church literature? What if all these hypothetical factors were present, and the counselee was a fifteen-year-old minor who had entered into the counseling relationship because she relied on the cleric's representation that the clergy could deal with suicide and severe emotional problems like the counselee's?

The scenario that these questions suggest is plausible. If a lawsuit ensues, jurors will judge whether the cleric has acted with reasonable care in the circumstances of his or her profession. If the cleric has not acted appropriately, he or she may face a judgment day sooner than he or she imagined.